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No. 83-1115

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERMAN V. KREZDORN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order dismissing, on grounds of prosecutorial vindictiveness, a conspiracy count added to a superseding indictment.

In 1979, petitioner, a United States Immigration Inspector, was indicted in the United States District Court for the Western District of Texas on five counts of forging border crossing cards of nonresident aliens, in violation of 18 U.S.C. 1426(a). After a jury trial, he was convicted on four counts and acquitted by the court on the remaining count. On appeal, the court of appeals reversed, concluding that the district court had committed reversible error by admitting into evidence 32 border crossing cards relating to crimes not charged in the indictment (Pet. App. D1-31; 639 F.2d 1327). Following the remand, the prosecutor obtained a superseding indictment on June 17, 1981, which charged

not only the substantive offenses on which petitioner had been convicted, but also charged that petitioner had engaged in a conspiracy to forge border crossing cards, in violation of 18 U.S.C. 371. The forgeries of the 32 border crossing cards were alleged as overt acts in the conspiracy.

On July 28, 1981, following an evidentiary hearing, the district court sustained petitioner's motion to dismiss the indictment on the ground of vindictive prosecution (Pet. App. C1-C18). In its findings of fact, the district court acknowledged that the government was not concerned with increasing the amount of punishment to which petitioner would be exposed but that its primary, if not sole, purpose was to overcome the objection of the court of appeals to the introduction of the 32 extraneous forgeries. Nonetheless, it found that the government had failed to carry its burden of demonstrating a lack of vindictiveness because it was attempting to deprive petitioner of the fruit of his successful appeal. A panel of the court of appeals affirmed (Pet. App. B1-B64; 693 F.2d 1221). The court granted the government's petition for rehearing en banc and, by a vote of 11-2, reversed the order dismissing the conspiracy count of the indictment (Pet. App. A1-A56; 718 F.2d 1360).

Petitioner contends (Pet. 11-29) that the conspiracy count of the indictment was correctly dismissed because a presumption of vindictiveness arose from the prosecutor's addition of the conspiracy charge and was not overcome by the prosecutor's justification for adding the charge. Whatever the merits of petitioner's contentions, they are not now ripe for review by this Court.¹ The court of appeals' decision

¹It is now more than three years since the return of the original indictment, more than thirty-one months since the return of the superseding indictment, and more than thirty months since the district court's dismissal order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioner.

places petitioner in precisely the same position he would have occupied if the district court had refused to exclude the evidence. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with ~~an~~^{his} other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.²

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

²Because this case is interlocutory, we are not responding on the merits of the questions presented by the petition. We will file a response on the merits if the Court requests.